Petition

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

81-1142

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM STUCKEY,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

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(11786)

Question Presented

Whether a corporate employee can invoke the corporate attorney-client privilege for his own communication made to corporate counsel when the corporation itself has waived the privilege.

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SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

WILLIAM STUCKEY,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court

of Appeals for the Second Circuit, affirming a judgment entered on June 11, 1981 in the United States District Court for the Southern District of New York.

CITATIONS TO OPINIONS BELOW

The Court of Appeals, Kaufman, C.J., affirmed the judgment of the District Court in an unreported opinion, a copy of which is annexed hereto as Appendix A-1, infra.*

The opinion of the District Court by Hon. Charles E. Stewart, Jr., United States District Judge, is printed in the Appendix, infra., p. A- . The judgment of the District Court is printed in the Appendix, p. A- .

JURISDICTION

The opinion of the United States Court of Appeals was entered on October

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* References preceded by "A" refer to the Appendix below; "R" to the transcript of the trial; and "Jt. App." to the Joint Appendix.

15, 1981. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

STATEMENT OF THE CASE

A. The Indictment

On January 20, 1981 petitioner was indicted for conspiracy, wire fraud and obstruction of justice. A second superseding Indictment was filed on April 9, 1981 on which trial was held. In essence, the Indictment charged that from 1975 through 1978 petitioner and four of his superiors at Mego Corporation, a wholly-owned subsidiary of Mego International, Inc., engaged in a scheme to defraud stockholders by selling defective goods for cash and not recording these receipts on the company books. The Indictment charged petitioner with conspiring with his superiors to further this scheme through the use of the telephone wires in violation of 18 U.S.C. Section 371, and

with substantive violations of the wire fraud statute, 18 U.S.C. Sections 1343 and 2. Petitioner was also charged with attempting to obstruct the communication of information to the grand jury and to an Assistant United States Attorney in violation of Title 18 U.S.C. Section 1503, 1510 and 2.

Outcome of the Trial

After verdicts of guilty on all of the above counts, petitioner was sentenced to serve a prison term of three months and was fined $10,000. His conviction having been affirmed by the Court of Appeals, petitioner paid the fine and is now serving that prison term.

Evidence at the Trial

Testimony of government witnesses established that among petitioner's responsibilities as manager of Mego Corporation's Long Island warehouse was the removal of defective goods which were no

longer of value to the corporation. In accordance with orders from his superiors in the New York City office, petitioner sold these defective goods for cash and turned over the proceeds to the same superiors in New York City, specifically Leonard Siegel, Executive Vice President of Mego Corporation. Because these same officers never reported these proceeds (about $60,000.) on the corporate books, petitioner is now serving a prison sentence for defrauding the company's stockholders.

During the years 1975-1978 petitioner dealt exclusively with Jo-Ro Sales, a New Jersey concern owned and operated by one Herbert Ristau. After telephoning petitioner to ascertain if returned merchandise was available, Ristau would visit petitioner at the warehouse, agree on a price which was approved by the New York office, and either pay petitioner in cash or receive credit on a running account

which petitioner maintained. Petitioner would then give Ristau a receipt and a bill of lading, keeping a copy for his own file.

Petitioner temporarily placed the cash in an office safe or in a company safe deposit box which he maintained at a local bank. Periodically petitioner took the accumulated cash into New York and turned it over to Leonard Siegel. During the early years Siegel gave petitioner a receipt, which petitioner kept in his file. When Siegel later refused to give petitioner a receipt for the cash proceeds, petitioner became suspicious of possible trouble and subsequently refused to deal in cash.

In the winter of 1980, the management of Mego International, Inc. became aware of possible problems within the company and its subsidiary as a result of a memorandum from a security officer of the com-

pany. An internal investigation was commenced, and a law firm was retained by the Special Audit Committee of the Board of Directors to conduct this internal investigation.

As part of the internal investigation, a member of the law firm retained as Special Counsel requested by letter and telephone that petitioner meet with him. He informed him of the legal purpose of the desired interview, advised petitioner to retain counsel if he wished, and stated that the company would pay the counsel fees. Petitioner finally met with Special Counsel on May 7, 1980 without the presence of his personal counsel. The questions posed to petitioner at the interview concerned matters within the scope of petitioner's duties as an employee of the subsidiary.

Because the law concerning the attorney-client privilege as it pertains to

corporate clients was uncertain at that time, Special Counsel prefaced the interview by advising petitioner of such uncertainty and stating that Special Counsel could not "guarantee" the confidentiality of their communications. (R. 479) However, petitioner was not told that he had the right to refuse to answer questions or that he could leave the interview at any time. Petitioner was therefore unaware of his options and unable to make an informed judgment as to his subsequent communications during the interview.

At the time of the interview, petitioner was faced with enormous job and family pressure. At age 54, petitioner had no employment contract; two of his four children were still in college; and his pension had not yet vested. In a desperate attempt to extricate himself from a scapegoat position into which he had been maneuvered by his superiors in their ef-

forts to save their own skins, petitioner made incriminating statements to Special Counsel during the interview and lied about the cash sales. Specifically, petitioner denied that he had ever sold any defective merchandise, that he had ever turned over any cash to Siegel, and that he had ever received $60,000. from Ristau.

Subsequently, Special Counsel was asked by the prosecution to disclose the statements which appellant made. Without obtaining petitioner's consent to waive any privilege of confidentiality that he may have had, Special Counsel revealed the substance of its interview with petitioner to the grand jury in July 1980, six months before this Court decided the case of Upjohn Company -v.- United States, ____U.S. ____, 101 S. Ct. 677 (1981). On the basis of this decision, prior to trial, petitioner moved to suppress these statements. (Jt. App. 36-38) This motion was denied and

at trial Special Counsel testified, as a government witness, to the foregoing statements of petitioner. (R. 478-85) These false statements were by far the most damaging evidence introduced at trial.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Court of Appeals has decided an important question of evidence which has not been but should be settled by this Court; because its decision appears to conflict with an applicable decision of this Court; and because the lower court's failure to exclude the evidence at issue, was a violation of petitioner's right to due process.

1. PETITIONER'S STATEMENTS TO CORPORATE SPECIAL COUNSEL WERE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE.

The common law rules of privilege have been expanded in most states and by this Court in Upjohn Co.-v.- United States,

_____U.S._____, 101 S. Ct. 677 (1981), to include in the corporate attorney-client privilege, communications by employees of the corporation and its subsidiaries in response to inquiries by corporate counsel conducting an internal investigation. Over the years the extent of this privilege as applied to corporations has varied from one circuit to another, and such questions as who may claim such protection and what conversations may be excluded from evidence have received conflicting answers.

Immediately prior to the Upjohn decision, the prevailing test regarding which individuals could claim the privilege in the name of the corporation was the narrow "control group test". City of Philadelphia -v.- Westinghouse Electric Corp., 210 F. Supp 483, 485 (E.D. Pa. 1962), petition for mandamus and prohibition denied sub nom. General Electric

Co. -v.- Kirkpatrick, 312 F.2d 742 (3rd Cir. 1962), cert denied, 372 U.S. 943 (1963). In Upjohn, this Court rejected the view restricting the attorney-client privilege to the corporate control group alone, a group of which petitioner was not a member.

Prior to the narrow control group test, the courts recognized a broad, more expansive attorney-client privilege for corporations as reflected in United States -v.- United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). Since the Federal Rules contain no specific privilege provisions but merely provide that federal courts shall apply the rules of privilege developed at common law, "as they may be interpreted by the courts of the United States in the light of reason and experience," Federal Rules of Evidence §501, it is up to this Court to define more precisely the extent of the oldest

common law privilege, that between attorney and client, as it relates to corporations.

In Upjohn, this Court decided that communications by employees of a corporation and its subsidiaries in response to inquiries by counsel for an internal audit committee of a corporation are included in the attorney-client privilege.

> ". . .the privilege exists to protect not only the giving of advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." 101 S. Ct. 677, 49 U.S. L.W. at 4095.

Thus, the encouragement of communications to corporate counsel is an essential ingredient of the corporate attorney-client privilege, and must be protected.

While the decision in Upjohn addressed the issue of who may claim the privilege on behalf of the corporation, there was no attempt in that case by the

parties actually making the statements to claim or waive the privilege as to themselves in their role as corporate employees. Therefore the question presented in this petition, which has not yet been addressed by this Court, is whether a mere employee who has made a statement to an attorney hired by the corporate employer to conduct an internal investigation is allowed to claim the protection of the attorney-client privilege when the corporation which hired him now seeks to expose him.

Contrary to the government's argument, petitioner does not seek to establish that the Special Counsel hired by Mego Corporation was acting on behalf of petitioner as an individual. Petitioner seeks only to be counted as a member of the corporation to the same extent as is a top management executive and member of the "control group." If the corporation seeking to conduct an

internal investigation is to have the benefit of requisite communications of its employees during the fact-finding process, the employee must be assured that his candor and honesty during such communications will be rewarded by confidentiality; otherwise there is no incentive for the corporate employee to divulge potentially incriminating information if he fears it will become public knowledge. Without the protection of the privilege for the employee as well as for the corporation, the fundamental purpose of the privilege is seriously undermined. Because the corporation is no more than the sum of its parts, the privilege extended to the corporation must embrace those individuals, acting in their capacity as corporate employees, who embody such corporation.

The government cites United States -v.- Demauro, 581 F.2d 50 (2d Cir. 1978), as authority for the proposition that

petitioner failed to prove the requirements of an attorney-client relationship. (Gov. Br. 41-42). However, the government misses the point. All of the elements of a corporate attorney-client relationship were clearly in evidence. In accordance with those elements enumerated in Demauro, 581 F.2d at 55, the evidence presented at trial clearly proved that appellant was a vice president of the corporation which retained Special Counsel and the interview during which the statements were made occurred in the course of an effort on the part of the corporation to obtain legal advice from a professional legal advisor acting in his capacity as such. It is submitted that petitioner's statements to Special Counsel for his employer, made in the course of the corporate fact finding process, were within the attorney-client privilege and should not have been disclosed by Special Counsel without the con-

sent of the person making such statements.

CONCLUSION

The recent Supreme Court decision in Upjohn and the resulting uncertainty as to the ramifications of such decision on the corporate attorney-client privilege create an urgent need for further clarification of the issues raised. For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York
December 11, 1981.

Respectfully Submitted,

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PAUL K. ROONEY, ESQ.,
KATE D. BAXTER, ESQ.,
Of Counsel.

Appendix

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of October one thousand nine hundred and eighty-one.

Present:

HONORABLE IRVING R. KAUFMAN

HONORABLE JAMES L. OAKES,
Circuit Judges,

HONORABLE EDMUND L. PALMIERI,
District Judge, sitting
by designation.

UNITED STATES OF AMERICA,
Appellee,

v.

81-1252

WILLIAM STUCKEY,
Defendant-Appellant.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Appellant's claim that the evidence was insufficient to support his conviction on the conspiracy and wire fraud counts is without merit. In an examination of the evidence to determine whether sufficient proof was adduced for the jury to find beyond a reasonable doubt that appellant is guilty of these offenses, the evidence must be viewed in the light most favorable to the Government, crediting all available inferences in favor of the Government. See, e.g., Glasser v. United States,

315 U.S. 60, 80 (1942); United States v. Singh, 628 F.2d 758, 765-66 (2d Cir.), cert. denied, 444 U.S. 1034 (1980). When viewed in this light, the evidence overwhelmingly establishes the existence of a scheme to misappropriate corporate assets and appellant's knowing participation in the scheme. There is no question that the merchandise sold belonged to Mego Corporation, that appellant handled the sales transactions and received the cash, and that the sales were not reported on the corporation's records. Appellant's own admissions corroborate the testimony of others.

2. Since a fraudulent scheme in violation of the mail and wire fraud statutes need not involve any actual pecuniary injury, see United States v. Barta, 635 F.2d 999, 1006 n.14 (2d Cir. 1980),

cert. denied, 101 S.Ct. 1703 (1981), appellant's claim that the evidence was insufficient on the ground that the amount involved (approximately $60,000) did not materially affect the financial condition of the corporation is without merit.

3. Viewed in the light most favorable to the Government, see Glasser v. United States, supra, United States v. Singh, supra, the evidence is clearly sufficient for the jury to find beyond a reasonable doubt that appellant endeavored to obstruct justice, in violation of 18 U.S.C. §§ 1503, 2, by lying about and concealing the existence of records that were being sought by Harris Rosenberg in June, 1980, pursuant to a grand jury subpoena duces tecum. The testimony of several witnesses

supports the jury's conclusion that appellant had prepared records of the fraudulent sales transactions and had destroyed them when it appeared that the scheme would be discovered. Appellant's claim that his conviction of obstructing the grand jury investigation should be reversed because the grand jury was not in fact misled by his misrepresentations is without merit because 18 U.S.C. § 1503 (1976) proscribes corrupt endeavor to obstruct justice as well as obstruction of justice. See United States v. Cioffi, 493 F.2d 1111, 1119 (2d Cir.), cert. denied, 419 U.S. 917 (1974).

4. When viewed in the light most favorable to the Government, Glasser v. United States, supra, the evidence is clearly sufficient for the jury to find beyond a reasonable doubt that

appellant endeavored to prevent Herbert Ristau from communicating information about the fraudulent scheme to the Assistant United States Attorney who was investigating the crime, in violation of 18 U.S.C. § 1510 (1976). Ristau himself testified that appellant tried to induce him to destroy his receipts by offering him bribes in the form of future sales of company close-outs.

5. Since significant steps in furtherance of the fraudulent scheme, including discussions at the Mego corporate headquarters, took place within the Southern District of New York, the Southern District was a proper venue for the prosecution of the wire fraud counts. See 18 U.S.C. § 3237 (1976); United States v. Cashin, 281 F.2d 669 (2d Cir. 1960).

6. Since appellant has not shown the existence of an attorney-client relationship between Elkan Abramowitz and himself, admission of statements made by appellant to Abramowitz during the course of the internal investigation undertaken by the latter did not violate any attorney-client privilege enjoyed by appellant. See United States v. Demauro, 581 F.2d 50, 55 (2d Cir. 1978).

7. Appellant's claim that the district court improperly received Stephen Weingrow's testimony concerning appellant's admissions on the ground that the court abused its discretion under Fed. R. Evid. 403 in holding that the probative value of this evidence outweighed any unfair prejudice. Since Judge Stewart undertook a careful inquiry into the

balance of probative value and prejudice, observing that the evidence was of probative value for demonstrating appellant's guilty knowledge, his decision was well within his discretion and should not be disturbed. United States v. Marino, 639 F.2d 882 (2d Cir. 1981).

8. Since Leonard Siegel has been a target of prosecution and the subject of an ongoing grand jury investigation, the trial court properly refused to order the Government to grant immunity to Siegel upon appellant's request. United States v. Turkish, 623 F.2d 769, 778 (2d Cir. 1980), cert. denied, 101 S.Ct. 866 (1981).

IRVING R. KAUFMAN,

JAMES L. OAKES, Circuit Judges,

EDMUND L. PALMIERI, District Judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	NOTICE OF MOTION PURSUANT TO RULE 29
-against-	:	
WILLIAM STUCKEY,	:	SS 81 Cr. 35 (CES)
Defendant.	:	

----------X

PLEASE TAKE NOTICE that, upon the affidavit of PAUL K. ROONEY, P.C., sworn to on the 6th day of May 1981, defendant WILLIAM STUCKEY will move this Court, the Hon. Charles E. Stewart, Jr., at the United States Courthouse, Foley Square, New York, New York on the 28th day of May 1981 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for the entry pursuant to Rule 29 of the Federal Rules of Criminal Procedure, of a judgment of acquittal of the offenses charged in

the Indictment on the ground that the evidence adduced at trial is insufficient to sustain a conviction of such offenses; and for such other, further and different relief as to the Court may seem just and proper.

Dated: New York, New York
May 7, 1981

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SCOTT G. CAMPBELL, Esq.
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We have reviewed the record in the light most favorable to the Government, pursuant to F.R.Cr.P. 29, and have determined that there is substantial evidence supporting jury's verdict convicting defendant of the crimes charged in the indictment. Indeed, as the

Government's references to the transcript indicate, defendant's arguments on this motion ignore the evidence of a scheme to defraud and serve to highlight the sufficiency of the evidence supporting the conviction. With respect to defendant's claims in paragraphs 14-26, we reaffirm our previous determinations denying defendant's motions on these issues.

Defendant's motion for a judgment of acquittal n.o.v. is denied.

SO ORDERED.

U.S.D.J.
June 17, 1981

JUDGMENT AND COMMITMENT ORDER

In the presence of the attorney for the government John Martin, U.S. Atty. the defendant appeared in person on this date June 4, 1981.

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

__X__ With Counsel Paul Rooney, Esq.
(Name of counsel)

__X__ Not Guilty 81,0659
6/12/81

There being a verdict of __X__ Guilty.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully & knowingly executing a fraudulent scheme to obtain money through interstate commerce and conspiring to do so and obstruction of justice. (Title 18, U.S.C., Section 371; 1343 & 2; 1503 & 2; 1510 & 2)

as charged in Cts. 1 thru 18******

The court asked whether defendant had anything to say why judgment should not

be pronounced because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWENTY SEVEN (27) MONTHS on Cts. 1 thru 18***, each count to run concurrently with each other. Pursuant to Title 18, U.S.C., Section 3651, the defendant is to serve THREE 93) MONTHS in a jail-type institution, the execution of the remainder of the sentence is suspended and the defendant is placed on Probation for a period of TWENTY FOUR (24) MONTHS subject to the standing probation order of this Court. The defendant is also FINED $10,000 on Count 1. On counts 2 thru 11, the defendant is also FINED $1,000 each count to run consecutively with each other

BUT CONCURRENTLY with Count 1. On Counts 17 & 18***, the defendant is FINED $5,000 each count consecutively with each other BUT CONCURRENTLY with Count 1, for a TOTAL FINE of $10,000 to be paid otherwise this shall be a COMMITTED FINE. As a special condition of probation, the defendant is to serve 200 hrs. in a community services program during his first year of probation as directed by the probation department. Defendant notified of his right to appeal and continued on bail pending outcome of appeal.

*****Counts 17 & 18 were originally cts. 19 & 20 before indictment was redacted. Original indictment 81 CR. 35 & s-81 CR. 35 remain open until outcome of appeal is known.

THE PREPRINTED LEGEND APPEARING AT THE BOTTOM OF THE JUDGMENT AND COMMITMENT ORDER IS ILLEGIBLE.

Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM STUCKEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an employee of a corporation can invoke the corporation's attorney-client privilege with respect to communications he made to corporate counsel in connection with an internal investigation into possible wrongdoing, when the employee had no personal attorney-client relationship with the attorney and the corporation itself has waived its privilege with respect to the communications.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1142

WILLIAM STUCKEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. a1-a8) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1981. The petition for a writ of certiorari was filed on December 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiracy to commit wire fraud (18 U.S.C. 371 and 1343), 16 counts of wire fraud (18 U.S.C. 1343), one count of obstructing justice (18 U.S.C. 1503), and one count of obstructing a criminal investigation (18 U.S.C. 1510). He was sentenced to 27 months' imprisonment, all but three months of which were suspended in favor

of probation, and was fined $10,000 (Pet. App. a2, a12-a14). The court of appeals affirmed (Pet. App. a1-a8).

1. The evidence at trial, the sufficiency of which is not challenged here, showed that petitioner and other executive officers of Mego Corporation and its parent, Mego International, Inc., defrauded those companies and their shareholders by selling corporate assets for cash without accounting for the funds received.

Petitioner was hired in 1971 as warehouse manager for Mego Corporation, a manufacturer of toys. Through that position and his later position as a vice-president, petitioner was responsible for the company's warehousing operations, including the inventory of closed-out and returned merchandise. Shortly after petitioner began working for Mego, a corporate officer—either Martin Abrams, chairman of the board of both corporations, or Leonard Siegel, secretary of Mego International and executive vice-president of Mego—asked petitioner to sell that company's returned merchandise for cash without keeping records on the company's books. Petitioner agreed to do so (Tr. 44-46, 94-95, 148-151, 158-160, 265, 302-304, 350, 431, 480, 613).

In 1975, petitioner began dealing with Herbert Ristau, a purchaser of closed-out and salvage goods. By 1978, petitioner's sales to Ristau exceeded $30,000 per year, all in cash (Tr. 106-107, 302). None of these sales was recorded on Mego's books. Instead, petitioner gave Ristau handwritten receipts of his payments. Petitioner kept a photocopy of each receipt in a folder that he locked in his office desk (Tr. 64-71, 78-79, 220, 215-223, 311-319, 355-363, 367-368, 435-436). He also did not turn the cash over to Mego, but rather gave it to Siegel personally. Until 1976, Siegel signed a receipt for the funds provided by petitioner, but in 1976 Siegel refused to make further written records. As a result, petitioner thereafter noted on his copy of the Ristau receipts

that he had delivered the money to Siegel (Pet. 5-6; Tr. 54-56, 107-108, 126-127, 136-138, 142, 227-229, 290, 312-313, 318, 590-591).

Petitioner and his fellow participants in the scheme concealed its existence from other corporate officers as well as from independent auditors. Abrams and Siegel told the auditors that the corporate books were accurate and that no unrecorded assets existed (Tr. 54-56, 105-108, 150, 178-189). When a company accountant confronted petitioner in late 1978 with his suspicions about the off-book sales, petitioner said he had sold some $50,000 of inventory and had given the proceeds to Siegel to give to the union or to union officials (Tr. 46-56, 149). The accountant's supervisor, however, succeeded in ending the investigation by falsely telling the accountant that the sales had stopped (Tr. 59-61). In 1980, the accountant told a newly hired vice-president of finance about petitioner's admissions, and an internal inquiry was begun (Tr. 62-64, 102-104).

2. In March 1980, Elkan Abramowitz, an attorney, was retained by Mego International to investigate admissions petitioner had made to the corporation's security director the previous month (Tr. 104-109, 466-468). After his cohorts assured petitioner that no one had betrayed him and that his job would be protected, petitioner agreed to deny the admissions and to deny that any scheme existed (Tr. 600, 605-609). Against the advice of one of his own attorneys, petitioner then contacted Abramowitz and agreed to an interview (Tr. 478).

Petitioner met with Abramowitz on April 24, 1980. Before any questioning took place, Abramowitz advised petitioner that he represented the board of directors of Mego International (Tr. 479). As petitioner concedes (Pet. 8), Abramowitz further told petitioner that he could not guarantee that any statement petitioner made would be kept confidential. Petitioner then denied that he had sold

any defective merchandise, that he had turned cash over to Siegel, or that he had received $60,000 from Ristau (Pet. 9).

At trial, petitioner moved to suppress these statements on the ground that they were made during the course of an attorney-client relationship (C.A. App. A-36 to A-38).[1] The district court denied the motion (*id.* at A-127 to A-130). The court of appeals affirmed petitioner's conviction, holding that he had failed to show the existence of an attorney-client relationship between himself and Abramowitz (Pet. App. a7).

ARGUMENT

Relying, as he did below, on this Court's decision in *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981), petitioner contends (Pet. 10-17) that his statements to Abramowitz should not have been admitted at trial because they were within the scope of an attorney-client privilege. Both courts below found, however, that petitioner's statements were not privileged because no attorney-client relationship existed between him and Abramowitz. This conclusion was abundantly correct. Hence, no further review is warranted.

The record demonstrates that Abramowitz advised petitioner that he represented the corporation, not petitioner, and that he could not guarantee the confidentiality of petitioner's statements. Indeed, Abramowitz further said that petitioner should assume that his statement would be discoverable by federal agencies, including the Department of Justice (Tr. 479). Moreover, petitioner had retained two attorneys prior to his meeting with Abramowitz. One attorney advised petitioner not to meet with Abramowitz, and the other testified as a defense witness at trial that petitioner had told him, in anticipation of the interview with Abramowitz, that he had made admissions about the scheme to the

[1] "C.A. App." refers to the joint appendix in the court of appeals

corporation's accountant and that he had been pressed by others to lie to Abramowitz and would do so in order to save his job (Tr. 605-609).

Under these circumstances, the courts below clearly were correct in concluding that petitioner had not carried his burden of showing that his statements were made in the course of a personal attorney-client relationship with Abramowitz. See, *e.g.*, *Weil* v. *Investment/Indicators, Research & Management, Inc.*, 647 F. 2d 18, 25 (9th Cir. 1981); *In the Matter of Grand Jury Empanelled February 14, 1978 (Markowitz)*, 603 F. 2d 469, 474 (3d Cir. 1979); *United States* v. *Demauro*, 581 F. 2d 50, 55 (2d Cir. 1978). Indeed, petitioner concedes (Pet. 14) that he had no personal attorney-client relationship with Abramowitz.

Petitioner contends (Pet. 14-17), however, that, as an officer and employee of the corporation, he should be entitled to invoke the attorney-client relationship between Abramowitz and the corporation and that his communications therefore were protected by the privilege attaching to such communications under this Court's decision in *Upjohn Co.* v. *United States, supra*. This contention is clearly in error, and petitioner cites no authority to support it. Although *Upjohn* involved communications made by corporate employees to an attorney for the corporation during an internal investigation, the issue in that case was whether the employee's communications fell within the *corporation's* attorney-client privilege, which had been invoked by the corporation (449 U.S. at 388). Here, since the corporate clients have not invoked the attorney-client privilege with respect to petitioner's statements to the corporations' attorney, *Upjohn* has no bearing. Compare *United States* v. *Demauro, supra*, 581 F. 2d at 54-55.

Petitioner argues (Pet. 15) that an employee must be permitted to invoke the privilege of the corporation in order to ensure complete internal investigations of a corporation

by ensuring the confidentiality—and therefore the candor—of the employee's statements. However, the attorney-client privilege exists for the corporate client's benefit, to enable it to obtain legal advice and to guarantee that the attorneys representing it have the necessary information on which to offer that advice. *Upjohn Co.* v. *United States, supra*, 449 U.S. at 389-392. It is for the client to decide what to do with the advice and information it has received from its attorneys. Here, the corporate clients concluded that their interests would best be served by exposing wrongdoing through the testimony of the attorney. Petitioner apparently believes that decision to have been unwise, because in his view it might deter employees from cooperating with such internal investigations in the future. But the weight that should be attached to this consideration in assessing the wisdom of waiving the attorney-client privilege is a matter for the client to decide. Petitioner cannot claim surprise by the clients' resolution of that matter here. He was warned by the corporations' attorney that he should assume that his communications might not be confidential and that the government might learn of them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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